

# **Helping Co-ops Thrive in Ontario: Modernizing the Legislative Framework for Co-operative Corporations in Ontario**

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*A joint consultation and review of the Co-operative Corporations Act by the Ministry of Finance  
and the Ministry of Government and Consumer Services*

*December 2018*



# Message from the Ministers

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The *Co-operative Corporations Act*, the legislative framework that governs over 1,000 co-operative corporations in Ontario, was enacted in 1974 — over 40 years ago. Since then, no effort has ever been made to listen to co-operative corporations on whether the legislative framework is working for them, and how it could be modernized to better meet the changing needs of co-operative corporations in today’s global economy.

Our government is taking action and undertaking a review of this 44-year-old legislative framework for the first time. As part of this review, we are launching a consultation to listen to co-operative corporations and their members, with a view to crowdsourcing ideas that would reduce legislative and regulatory burden, streamline outdated requirements and bring the framework into the 21<sup>st</sup> century. These ideas will help inform a new and more competitive legislative framework for co-operative corporations.

Our government is committed to making Ontario Open for Business and helping co-operative corporations succeed, so that their members — The People — and communities in which they operate can benefit from job creation and better products and services.

Vic Fedeli  
Minister of Finance

Bill Walker  
Minister of Government and Consumer Services



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# Executive Summary

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We are inviting Ontario businesses and individuals to share their feedback about how to make it easier for co-operative corporations (“co-ops”) to do business in the province.

## What are co-ops?

Co-ops are corporations owned by their members to satisfy common needs, and are guided by seven co-operative principles:

1. Open and Voluntary Membership
2. Democratic Member Control
3. Members' Economic Participation
4. Autonomy and Independence
5. Education, Training and Information
6. Co-operation Among Co-operatives
7. Concern for Community

Co-ops are an important part of Ontario’s economy, and serve the needs of their members in communities across the province.

## About the consultation

The *Co-operative Corporations Act* (CCA), the legislation under which Ontario co-ops operate, came into force in 1974 and has not been kept up to date.

Currently, two Government of Ontario bodies oversee the CCA. The Ministry of Government and Consumer Services (ServiceOntario) is responsible for incorporating co-ops, including filings that make changes to incorporation documents, and the Financial Services Commission of Ontario (FSCO) is responsible for administering other parts of the CCA, such as reviewing co-op offering statements, on behalf of the Ministry of Finance.

In 2019, FSCO will be replaced by the Financial Services Regulatory Authority of Ontario (FSRA). However, FSRA will not have oversight of co-ops. For this reason, another government body will need to administer the parts of the CCA that do not currently fall under ServiceOntario’s oversight.

In conducting the first-ever review of the CCA, the government is looking for opportunities to modernize the legislation, find efficiencies and cut red tape, so that co-ops can compete and better meet the needs of their members.

To do that, we would like your input on:

- **Improving the business environment for co-ops:** We want to hear about the benefits of the co-op business model and how the government can make it easier for co-ops to do business in Ontario.
- **Co-op governance:** Tell us how co-ops could be better enabled to self-govern and possible ways to reduce red tape in the sector.
- **Administration and oversight:** Share your experiences working with the government and your views on which government body should be responsible for administering the CCA.
- **The “50 per cent rule”:** This rule limits the amount of business that co-ops are permitted to do with non-members to 50 per cent. Provide your views on whether this rule should be changed and whether co-ops and their members should be allowed to set their own rules.
- **Audit requirements:** Tell us whether co-op audit requirements and exemptions from such requirements should be the same as or different from those in place for other types of business corporations in Ontario.
- **Raising capital:** We want to hear your views on whether there should continue to be a different regime for co-ops that wish to raise capital than the regime in place under the Securities Act for other types of businesses in Ontario, which currently provides various exemptions from prospectus requirements.

*Thank you in advance for having your say!*

*If you would like to learn more about these topics, you can read the entire consultation paper here or download the full PDF online at [www.fin.gov.on.ca/en/consultations/cca/index.html](http://www.fin.gov.on.ca/en/consultations/cca/index.html)*

### **Questions for feedback**

- In what ways do you currently interact with government and what do you think could be improved with respect to those interactions?
- What are the top three priorities that should be considered as part of the CCA legislative review?

- Do you consider the existing governance framework in the CCA to be reflective of today's co-ops? Should the governance framework be the same for co-ops with or without share capital?
- What role should co-op boards play in ensuring legislative requirements are followed? Should government still play a role in enforcing whether CCA requirements are met?
- Is the CCA sufficiently clear regarding the rights of co-op members? If not, please provide examples of provisions that could be clarified.
- Should special circumstances exist under which directors would be able to enact specific by-laws by directors' resolution, without seeking the approval of members? Under what circumstances do you see that happening?
- What government body should be responsible for the administration and oversight of the CCA?
- Should the restrictions in the CCA on how much business a co-op can do with non-members (i.e., the "50 per cent rule") be maintained? Or should co-ops be permitted to determine thresholds for non-member business as part of their articles, by-laws, or other incorporation or governance documents?
- Should co-ops that meet certain criteria be permitted to provide their members with alternative forms of assurance other than a full audit (e.g., a review engagement)?— What should those criteria be?
- Should there continue to be a separate capital-raising framework for co-ops, or should co-ops be subject to the same Ontario's securities laws, that other business corporations in Ontario are subject, including the exempt market framework?
- If the government were to maintain a separate capital-raising framework for co-ops, should the process for reviewing offering statements continue to be subsidized by the government or should the fee be determined on a cost-recovery basis, and based on factors such as the amount, type, or complexity of the offering? If the former, please explain why subsidization should continue.
- In determining an appropriate administrative and oversight framework for co-ops, what considerations, if any, need to be given to non-profit housing co-ops, worker co-ops and other specific types of co-ops?



# How to Participate

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Interested parties are invited to make written submissions by January 31, 2019.

You may send comments by mail or email to:

*CCA Legislative Review*  
c/o Financial Services Policy Division  
Ministry of Finance  
95 Grosvenor Street, Frost Building North, 4th Floor  
Toronto, ON M7A 1Z1  
Email: [Jessica.Harper@ontario.ca](mailto:Jessica.Harper@ontario.ca)

Phone: (416)325-5790

You can also respond directly to our key questions for feedback by filling out an [online survey](#). Please note that this is a public consultation, and all submissions received are subject to the *Freedom of Information and Protection of Privacy Act*. All comments received will be considered public and may be used by the Government to help evaluate and revise the legislation. This may involve disclosing some or all comments or materials, or summaries of them, to other interested parties during and after the consultation. Personal information will not be disclosed without any parties' prior consent.

If you have any questions about this consultation or how any element of your submission may be used or disclosed, please contact Jessica Harper, Senior Policy Advisor, Financial Services Policy Division, Ministry of Finance by phone at 416-325-5790 or by email: [Jessica.Harper@ontario.ca](mailto:Jessica.Harper@ontario.ca)



# 1. Introduction: Co-ops in Ontario — Challenges and Priorities

Co-ops are an important part of Ontario’s economy. Co-ops benefit their members by providing access to goods and services that might otherwise be out of reach by delivering economies of scale and affordability. They can also foster economic growth by providing on-the-job training opportunities. The co-op business model can also be attractive for new entrepreneurs who are looking to establish a social benefit enterprise. As well, there is evidence that co-ops have a longer life span than other businesses, making them an attractive business model. They create jobs in communities across the province, including those in rural and northern regions.

## Co-operative Principles

The International Co-operative Alliance (ICA) defines a co-operative or “co-op” as “an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.” Broadly speaking, a co-op is a business owned and controlled by the people (members) who use its products or services.

### Co-operative Principles

Adopted in 1995 by the International Cooperative Alliance

<b>Voluntary and Open Membership</b>	Membership in a co-operative is voluntary and non-discriminatory
<b>Democratic Member Control</b>	Each member receives one vote. This is in contrast to other corporations where the number of shares owned determines voting power.
<b>Member Economic Participation</b>	Members contribute to, and democratically control, the financial resources of their co-operative.
<b>Autonomy &amp; Independence</b>	Co-operatives are independent, self-help organizations controlled by their members.
<b>Education, Training, and Information</b>	Co-operatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives. They inform the general public - particularly young people and opinion leaders - about the nature and benefits of co-operation.
<b>Cooperation Among Co-operatives</b>	Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.
<b>Concern for Community</b>	Co-operatives work for the sustainable development of their communities through policies accepted by their members.

## Ontario's Co-op Framework

Currently, co-ops are regulated under the CCA, which came into force in 1974. Until recently, the Minister of Finance was solely responsible for administering the CCA. However, as of October 29, 2018, the responsibility for the incorporation of co-ops, including filings to make changes to incorporation documents, was transferred from the Financial Services Commission of Ontario (FSCO) to Ministry of Government and Consumer Services. As a result, the Minister of Finance and the Minister of Government and Consumer Services now have shared responsibility for the oversight and administration of the CCA.

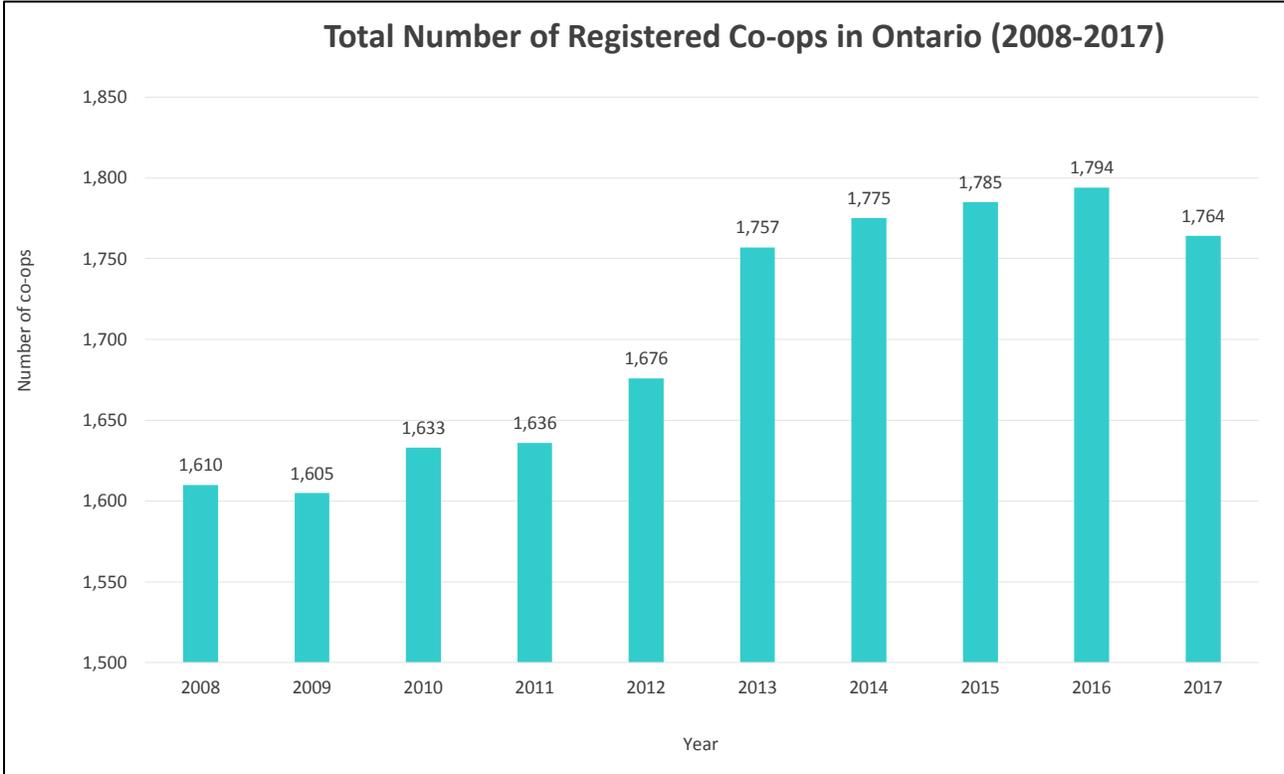
The Minister of Finance has delegated certain powers and authorities under the CCA to the Superintendent of FSCO which remains responsible for reviewing co-op offering statements and generally enforcing compliance with the CCA. Incorporation-related services are carried out by ServiceOntario, the division of MGCS that is responsible for incorporating other types of businesses and not-for-profits in Ontario.

In addition, a new financial services regulator, the Financial Services Regulatory Authority of Ontario (FSRA), has been established pursuant to the *Financial Services Regulatory Authority of Ontario Act, 2016* (FSRA Act), and will ultimately replace FSCO as the regulator for the insurance, pension, mortgage brokering, credit union and loan and trust sectors in Ontario. The FSRA Act does not assign the oversight of co-ops to FSRA, as such a role would not be consistent with FSRA's mandate as a financial services regulator.

# Profile of the Co-op Sector in Ontario

On average, approximately 25 new co-ops are incorporated on an annual basis. Over the years, the number of co-ops registered in Ontario has remained fairly stable.

## Ontario Co-ops, 2008-2017. (Source: FSCO Annual Report 2016-17)



According to FSCO’s records<sup>1</sup> there are currently 1,733 co-ops registered in Ontario that are subject to the CCA. In 2015 FSCO issued a Mandatory Information Return for co-ops. Based on the data gathered from this exercise, as well as other follow-up work, FSCO has determined that, as of May 30, 2018, 1,066 of the co-ops that are registered in Ontario are active. In comparing the total number of co-ops per province, Ontario (1,066 active co-ops representing approximately 162,000<sup>2</sup> members) is second only to Quebec, which reports having approximately 2,800 co-ops, representing 1.3 million members.<sup>3</sup> It’s important to note that these figures are based on survey data and differences between provinces may also be attributable to differences in sectoral distribution across provinces as well.

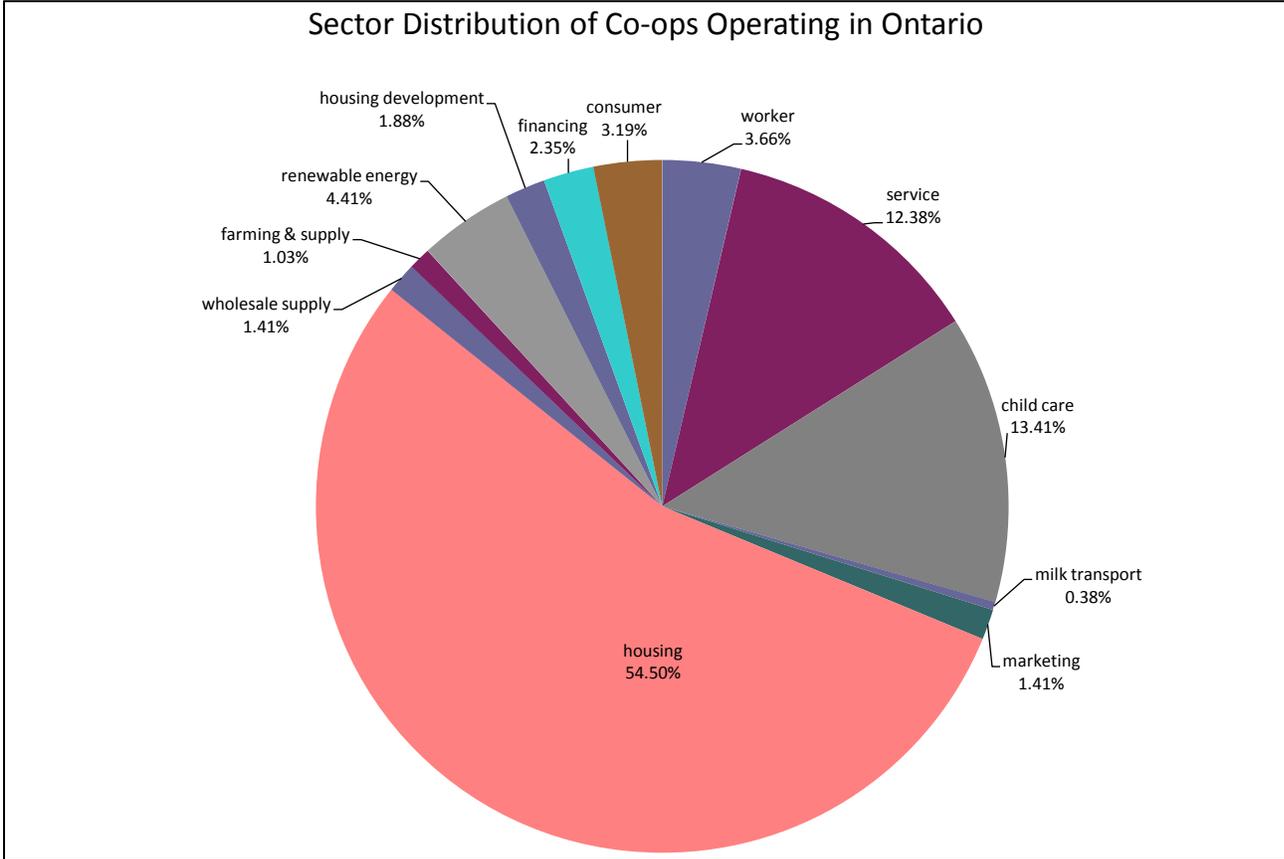
<sup>1</sup> As at May 30, 2018

<sup>2</sup> [https://www.ic.gc.ca/eic/site/106.nsf/eng/h\\_00151.html](https://www.ic.gc.ca/eic/site/106.nsf/eng/h_00151.html)

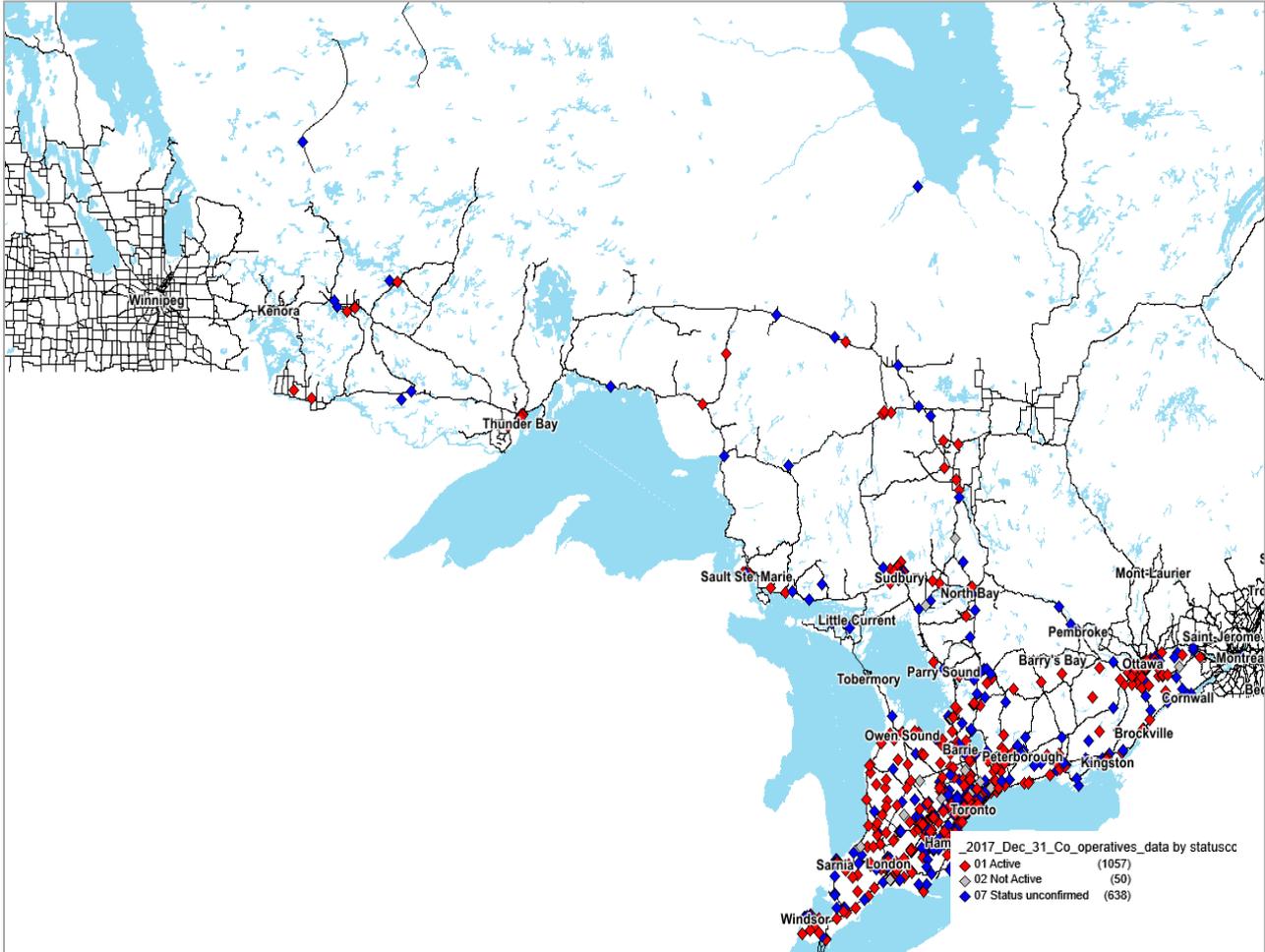
<sup>3</sup> [https://www.economie.gouv.qc.ca/objectifs/informer/cooperatives/page/apercu-10303/?no\\_cache=1&tx\\_igaffichagepages\\_pi1%5Bmode%5D=single&tx\\_igaffichagepages\\_pi1%5BbackPid%5D=68&tx\\_igaffichagepages\\_pi1%5BcurrentCat%5D=](https://www.economie.gouv.qc.ca/objectifs/informer/cooperatives/page/apercu-10303/?no_cache=1&tx_igaffichagepages_pi1%5Bmode%5D=single&tx_igaffichagepages_pi1%5BbackPid%5D=68&tx_igaffichagepages_pi1%5BcurrentCat%5D=)

FSCO has grouped co-ops into 12 categories based on the industries in which they operate, such as housing, child care, agriculture and renewable energy. (Although credit unions are a type of co-op, they are regulated separately under the *Credit Unions and Caisses Populaires Act, 1994* and are not subject to the CCA. As such, credit unions are not included in FSCO’s data on co-ops.)

**Sector Distribution for 1,066 Co-ops Operating in Ontario, as of May 30, 2018**



Co-ops exist in many industries and are located across the province. They are more densely distributed around the Greater Toronto and Hamilton Area (GTHA). This can likely be attributed to the large proportion of non-profit housing co-ops in the GTHA, as well as the overall population concentration in this region.



### Challenges Faced by Co-ops

Co-ops in Ontario have highlighted a number of challenges, including a lack of public awareness of the co-op model, resource constraints, and an outdated legislative and regulatory framework. Other challenges identified by co-ops include: ensuring co-ops remain relevant to contemporary needs; governance; broad economic trends; globalization; the sharing economy; member commitment/engagement; and changing technology. Many co-ops have argued that these challenges are impeding their growth potential and their long-term viability.

Co-op stakeholders have also suggested that the co-op sector in other provinces is more vibrant compared to Ontario's co-op sector. In 2015, co-ops in British Columbia reported having more than 4.97 million members across various industry sectors, reporting the largest total membership base compared to co-ops in other provinces (note: some of these members may be in other provinces and may include membership in credit unions). Also in 2015, co-ops in Saskatchewan reported business volumes of \$12.7 billion and assets of \$8.6 billion. In contrast, Ontario's co-ops reported having \$3.1 billion in business volume and \$3.0 billion in assets.<sup>4</sup>

As we explore the legislative framework for co-ops in Ontario, we must consider the principles underlying the co-op model as a whole, alongside the challenges that Ontario's co-ops face. Your feedback on this paper and the discussion questions that follow will help inform co-op policy development as part of the CCA legislative review.

**Questions for consideration:**

- What is your vision for co-ops in Ontario?
- What are the benefits of the co-op model, compared to other business models?
- In what ways do you currently interact with government and what do you think could be improved with respect to those interactions?
- What are the top three priorities that should be considered as part of the CCA legislative review?

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<sup>4</sup> Co-operatives in Canada, 2015. [https://www.ic.gc.ca/eic/site/106.nsf/eng/h\\_00151.html](https://www.ic.gc.ca/eic/site/106.nsf/eng/h_00151.html)

## **2. Improving the Business Environment for Co-ops and Reducing Red Tape**

The CCA has not been the subject of a full legislative review since it came into force in 1974. Co-op representatives have encouraged the government to undertake a full review of the legislation with a view to modernizing and streamlining its provisions with other business law statutes. Consolidating incorporation-related services for co-ops with those provided for other corporations by ServiceOntario, a division of MGCS, was an important first step towards modernizing the CCA to better meet the changing needs of co-ops in today's global economy.

### **I. *Competitiveness: Alignment with Other Business Statutes***

#### **Incorporation and Fundamental Principles of the CCA**

It has been argued that the CCA has not kept pace with other business and corporate statutes in Ontario, namely the Ontario *Business Corporations Act* (OBCA) and reforms in respect of the not-for-profit sector reflected in the *Not-for-Profit Corporations Act, 2010* (ONCA), which, if proclaimed, would largely replace the *Corporations Act* (CA). Since the ONCA is the most recently introduced corporate statute in Ontario, it may be appropriate for comparative purposes.

In Ontario, entities that wish to include “co-operative” as part of their corporate business name must incorporate under the CCA. However, another type of business entity (e.g., a trust, partnership, or joint venture) may adopt co-operative principles relating to ownership and governance in its constating documents (e.g., articles of incorporation) or as part of its contractual arrangements, and may also provide for returns or distributions that are similar to dividends paid by co-ops to their members.

One key difference between the CCA and other Ontario business statutes is that the CCA places an onus on government to ensure that the articles and related documents filed by co-ops substantively comply with the legislation (i.e., the constating documents must “conform to law”) as a condition of issuing a receipt or certificate under the CCA. For example, subsection 6(1) of the CCA requires the Minister to determine whether a co-op's articles meet the requirements of the CCA as a condition for filing and issuing a certificate of incorporation.<sup>5</sup>

In contrast, under the OBCA, the responsibility for ensuring that a corporation's articles conform to law is placed on the corporation. Incorporation is “as of right”, meaning that a certificate of incorporation is issued if MGCS receives completed articles of incorporation executed in accordance with the OBCA, any other required documents, and payment of the

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<sup>5</sup> Many of the Minister of Finance's powers under the CCA have been delegated to the Superintendent through a Minister's Delegation of Powers and Duties under the CCA.

required fee. The requirement that articles and other documents could not be filed unless they “conformed to law” was eliminated from the OBCA in 1979.

The government is interested in obtaining views from co-ops, their members and other interested parties on whether the CCA should be amended to place responsibility on co-ops to ensure that their articles and other documents conform to law and adopt an “as of right” approach similar to the OBCA, or whether there are benefits to maintaining the existing “conform to law” approach.

## **Investigations**

Under the CCA, a member of a co-op may apply to the Superior Court of Justice for an order appointing an inspector to investigate the affairs and management of the co-op and/or its subsidiaries, and to audit the accounts and records of the co-op or any affiliate. The Superintendent of FSCO is also required to appoint an inspector to investigate the affairs and management of a co-op or its subsidiaries in certain circumstances, and if 10 per cent of the members of the co-op request it. Depending on the results of the inspection, various actions may be taken against the co-op, such as applying to the court to wind up the co-op or recommending that the Minister of Government and Consumer Services cancel the co-op’s certificate of incorporation for cause.<sup>6</sup>

Under other business statutes such as the ONCA, a member or a debt obligation holder can apply to the court and the court may direct an investigation and appoint an inspector. In addition, under the OBCA, a registered or beneficial owner of a security, or the Ontario Securities Commission (OSC) in the case of an “offering corporation”, may apply to the court for an order directing an investigation.

With respect to co-op member complaints and investigations, the most common causes of complaints have been contractual disputes, governance issues and unlicensed activity, over which FSCO does not have jurisdiction. Since 2014, FSCO has received fewer than 30 complaints from members of co-ops, resulting in only one investigation during this time period. Given that little to no regulatory enforcement action by FSCO has been required, it may be preferable to adopt an enabling approach in the CCA similar to that found in other business law statutes, to clarify that the responsibility for addressing complaints would fall solely to members and a co-op’s internal governance mechanisms, as opposed to relying on an external government regulator.

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<sup>6</sup> Bill 57, *Restoring Trust, Transparency and Accountability Act, 2018*, which received Royal Assent on December 6, 2018, amended sections of the CCA, which once proclaimed, would replace references to the Superintendent with Minister. It is intended that this power would be delegated to the Superintendent, until such a time that a decision is made to transfer the CCA to another government body.

### Questions for consideration:

- What role should co-op boards play in ensuring legislative requirements are followed? Should government still play a role in enforcing whether CCA requirements are met?
- In seeking to align the CCA with other business law statutes, are there requirements for co-ops that should be aligned with similar requirements for other types of business corporations, such as, but not limited to:
  - Corporate powers, including borrowing powers
  - Directors, officers and insiders
  - Records
  - Investigations
  - Enforcement of legislative rights and duties
  - Members' rights and responsibilities
- Should the CCA adopt an "as of right" approach to incorporation?
- Are there any other areas where co-ops can self-regulate more efficiently and effectively?

## **II. *Co-op Governance***

Corporate governance for co-ops is unique because, in addition to overseeing management and setting strategic direction, the board of a co-op is also responsible for the needs and rights of its members. The CCA contains a rather prescriptive governance framework that, among other things, encompasses election and responsibilities of a co-op board, expectations with respect to management of the affairs and business of the co-op, and rights and responsibilities of members. For example, unlike other business corporations, a co-op board is required to file some of its by-laws with MGCS (ServiceOntario).

When compared to the CCA, other business statutes tend to be more enabling with respect to prescribing requirements related to board size, board member residency requirements, and determination of quorum. For example, a corporation may elect to include certain elements of governance as part of its articles or by-laws. On the other hand, under the unproclaimed ONCA, where no by-laws have been passed by a not-for-profit corporation within 60 days of incorporation, the corporation may be deemed to have passed standard, organizational by-laws approved by the Director.

The government is interested in hearing your views about co-operative governance generally, including whether there are examples of more modern governance requirements, such as those found in other business law statutes, that should be considered as part of this review.

**Questions for consideration:**

- Do you consider the existing governance framework in the CCA to be reflective of today's co-ops? Should the governance framework be the same for co-ops with or without share capital?
- Do you think it would be preferable to adopt an enabling approach with respect to co-op governance in the CCA, similar to the other business law statutes, such that by-laws would never need to be filed with the government?
- Should standard organizational by-laws apply to co-ops, if none are passed by the directors or approved by the members?
- Are there any other co-op board governance issues that should be examined as part of this review? If so, please elaborate.

**Duties and Qualifications**

Similar to other business law statutes, the CCA sets out requirements with respect to the election and qualification of directors, the duties and responsibilities of a co-op board, the passage of by-laws, and what forms part of the articles of incorporation. The CCA also requires directors to discharge their duties with reasonable prudence, diligence and competence and/or skill.

The director qualification requirements and the expectations and duty of care of directors under the CCA are broadly similar to those under the ONCA and the OBCA. However, with respect to directors' qualifications, the CCA, in some cases, contains outdated references to other statutes (e.g., references to the *Substitute Decisions Act, 1992* in determining whether a person is capable of managing property). There are also no explicit requirements in the CCA regarding criminal background checks for directors or providing other levels of assurance that directors have not been found guilty of an offence.

## Residency Requirements

The CCA requires that a majority of directors (i.e., more than 50 per cent) be resident Canadians, whereas the OBCA requires a minimum of only 25 per cent of directors to be resident Canadians. Residency requirements are also found in other provincial co-op statutes, including in British Columbia and Alberta, which stipulate that the majority of the directors are required to be residents of Canada and of the province, respectively.

## Quorum Requirements

The CCA, CA, OBCA and ONCA all set out requirements for determining quorum for a board of directors. All four statutes set out that, unless the by-laws provide otherwise, a majority of the board of directors constitutes a quorum, but the CCA and the CA set out an additional requirement that quorum must not be less than two-fifths of the board of directors, regardless of any provisions in the by-laws. Co-op stakeholders have noted that this may be confusing for co-ops whose by-laws allow for a range of directors to be elected rather than a fixed number.

Of note is that under the ONCA, if proclaimed, boards would have some flexibility to alter or remove certain quorum requirements which call for meetings to be rescheduled if quorum is not met at the opening of the meeting.

### Questions for consideration:

- Should the requirements for duties and qualifications of directors be aligned with those in another business statute (e.g., the ONCA)? Would there be merit in aligning the board residency requirements in the CCA with those in other business statutes? Why or why not?
- What are your views on requirements regarding the quorum of directors?
  - Is the CCA sufficiently clear in this respect? Please provide examples of provisions that should be clarified.
  - Is there merit in aligning the quorum requirements under the CCA with either the OBCA or ONCA? Why or why not?
- What other changes (if any) could be made to address co-op governance?

## **Director Liabilities and Indemnification**

The CCA outlines a number of different areas where there is joint and several liability for directors, including liability for wages. While these provisions are standard across the other business statutes, the CCA does not expressly permit a director who satisfies a liability claim to recover a contribution from any other directors who were also liable for the claim.

In addition, the CCA does not impose a limitation period in respect of the court's authority to make orders under the CCA relating to the contravention of certain provisions governing the purchase of shares, loan repayments and the payment of dividends. In contrast, the ONCA, if proclaimed, would impose a two-year limitation period.

### **Questions for consideration:**

- Are there elements of the CCA in relation to the rights and responsibilities of directors, including issues relating to joint and several liability for directors that should be considered as part of this review?

## **III. *Members' Rights***

In line with co-operative principles, the CCA provides a framework to enable members' economic participation and ensure democratic control of the co-op. Specifically, the CCA provides members with rights to: elect directors; raise any matter relevant to the affairs and business of the co-op at the annual meeting; examine the records of a co-op; require an audit; and seek court orders for investigations of the affairs and management of the co-op.

Furthermore, under the CCA, certain decisions require a special resolution of members, such as amending the articles of incorporation; enactment of by-laws; the sale, lease, exchange or other disposition of all or substantially all of the property of a co-op; and providing for an exemption from audit provisions. The ONCA, if proclaimed, would also require a special resolution of the members of a not-for-profit corporation for some business decisions.

### **Questions for consideration:**

- Is the CCA sufficiently clear regarding the rights of co-op members? If not, please provide examples of provisions that should be clarified.
- Does the requirement for a special resolution by co-op members to enact by-laws and approve other decisions of co-op boards hinder the activities of a co-op?
- Should special circumstances exist under which directors would be able to enact specific by-laws by directors' resolution, without seeking the approval of members? Under what circumstances do you see that happening?

- Does the CCA adequately enable co-op members' participation in decision-making while setting out remedies that members could use if they were not satisfied with how the affairs of a co-op were conducted, or if disputes arise?
- Does the CCA need to explicitly recognize federations or leagues? If so, what changes to the CCA should be contemplated to ensure that members of a federation (i.e., co-operative enterprise members) are represented?

### **3. Administration and Oversight**

FSRA will replace FSCO as Ontario's financial services regulator. Since FSRA's mandate is focused on regulating pension plans and financial services providers, it will not have a mandate for oversight of the co-op sector. Therefore, FSCO's responsibilities under the CCA will need to be transferred to another government body. Some co-op representatives have expressed support for the recent transfer of incorporation-related responsibilities to MGCS, and have suggested that MGCS would be the appropriate ministry to administer the entire CCA, except for the review of offering statements, noting that this would be consistent with MGCS's role in administering Ontario's other business statutes. These other business statutes do not contain an offering statement regime and, as a result, MGCS does not review offering statements or other documents related to capital-raising in Ontario.

Across Canada, the approach for administering co-op statutes varies by province. For example, in British Columbia, Alberta and Nova Scotia, government and business services ministries are responsible for administering co-op legislation. In contrast, Quebec's economic development ministry has carriage of Quebec's co-op legislation. In New Brunswick, the Financial and Consumer Services Commission, the province's financial services and consumer protection regulator, administers co-op legislation. In Manitoba, the Manitoba Financial Services Agency and Manitoba Growth, Enterprise and Trade share co-op sector responsibilities.

#### **Questions for consideration:**

- What government body should be responsible for the administration and oversight of the CCA?

## **4. Key Components of the Legislative Framework for Co-ops**

### **I. The “50 per cent Rule” and Co-operative Status**

Of the seven co-operative principles published by the ICA, the third principle – “Member Economic Participation” – reflects one of the key differences between member-owned co-ops and investor-owned corporations. Adherence to this principle is the foundation of a number of key elements of the CCA, including requirements for conducting business with members.

The CCA requires co-ops to conduct at least 50 per cent of their business with their members, unless an exemption applies. This is commonly known as the “50 per cent rule”. If a co-op has conducted 50 per cent or more of its business with non-members for a period of three years or more, the Minister may decide to issue a certificate of amendment converting the co-op to another type of corporation under either the OBCA or the CA.

The CCA currently exempts renewable energy co-ops (RECs) from the 50 per cent rule.

#### **Other Canadian Jurisdictions**

Ontario and Quebec are the only two provinces with a 50 per cent rule in their co-op legislation. The federal *Canada Cooperatives Act* imposes a limit on non-profit housing co-ops for non-member business, but not on other types of co-ops. In Alberta and British Columbia, co-ops may set the proportion of business that they will conduct with non-members in their memorandum or articles of incorporation, as well as in their by-laws or rules of association.

A number of Canadian jurisdictions impose requirements on worker co-ops, with respect to employing non-members, by requiring a certain portion of employees to also be members of the co-op. Manitoba’s co-op legislation sets out a maximum 20 per cent threshold on the number of non-employee members that a worker co-op may have. In Alberta, a worker co-op may provide employment or contract work to non-members under certain conditions, if at least 75 per cent of its permanent employees or contractors are members.

Similarly, non-profit housing co-ops in some jurisdictions have set minimum membership thresholds. For example, in Saskatchewan, at least 90 per cent of housing co-op residents are required to be members.

#### **Maintenance of Co-operative Status**

In addition to the 50 per cent rule, the CCA includes a number of requirements for a co-op to maintain its “co-operative status”. These provisions refer to the definition of what it means to

be carrying on an enterprise on a “co-operative basis”. Requirements in the CCA for a co-op to carry on an enterprise on a “co-operative basis” include ensuring that each member or delegate has only one vote, no proxy voting, operating as nearly as possible at cost, and restrictions on interest and distributions. In addition, the CCA also includes a number of provisions that deem certain activities to be business transactions with members for the purposes of enforcing these requirements including the selling of products, goods or services to or for a marketing board, where required by law.

Requirements in the CCA for a co-op to maintain its co-operative status include maintaining a minimum number of members, as well as a minimum number of directors.

### **Questions for consideration:**

- What are the core elements that define a co-op or the concept of operating on a “co-operative basis”?
  - Should these elements be legislative requirements, or could they be left to a co-op’s articles or by-laws?
- Is the CCA definition of conducting affairs on a “co-operative basis” still relevant to co-ops today?
  - If not, what should be changed or included in this definition, e.g., should the act require a co-op to provide education to its members on the principles and techniques of cooperative enterprise, in accordance with the fifth ICA principle (Education, Training and Information)?
  - Does the definition of deemed business under the CCA sufficiently account for all relevant business activities, including those of marketing boards and business with subsidiaries?
- Should the restrictions in the CCA on how much business a co-op can do with non-members (i.e., the “50 per cent rule”) be maintained? Or should co-ops be permitted to determine thresholds for non-member business as part of their articles, by-laws, or other incorporation or governance documents?
- Are there any specific types of co-ops (e.g., housing or other) for which the 50 per cent rule is of particular importance, relative to other types of co-ops?
- Do you feel that the Minister’s authority to convert a co-op to another type of business for non-compliance with the 50 per cent rule is an appropriate enforcement mechanism? Is there a better alternative for enforcement? Please explain.

## **II. *Audit requirements***

Some representatives of co-ops have argued that the cost and administrative burden associated with audit requirements in the CCA can be considerable, particularly for smaller co-ops, and that, regardless of the size of a co-op's membership, co-op boards should have the ability to exempt their co-ops from audit requirements in any given financial year.

Any legislative requirement for audits should balance the costs of audit and the resulting benefits for the members of the co-op. This is particularly the case for smaller co-ops, for which an audit imposes a cost burden which may not be justified.

Under the CCA, co-op members are required to appoint one or more auditors for a period of one calendar year at each annual meeting. Co-ops may be exempted from the audit requirement only if they meet all of the following conditions:

1. The co-op has 15 members or fewer, and all the members consent in writing to the exemption, or the co-op has more than 15 but fewer than 51 members and the exemption is approved by a special resolution (i.e., passed by the directors and confirmed by at least two-thirds of the votes cast by members at a general meeting);
2. The co-op's capital, assets, and gross revenue or sales do not exceed \$500,000 each for the year in which the audit exemption is claimed; and
3. The co-op does not receive any government grants or subsidies that require the co-op to be audited.

In addition, the CCA exempts from audit requirements co-ops that have never issued securities, and have less than \$5,000 in each of assets and capital, regardless of whether the co-op meets the exemption criteria noted above. The \$5,000 exemption threshold was enacted in 1978 and has not been amended since that time. The 51-member maximum threshold for audit exemptions (noted above) has been in place since 1992. The \$500,000 maximum threshold for capital assets and gross revenues has also been in place since 1992. Some co-op stakeholders have argued that these thresholds should be increased.

When comparing the audit exemptions in the CCA to those in other Ontario business law statutes, the CCA could be perceived to be more stringent, depending on the nature of the co-op's enterprise. For example, compared to the not-yet-proclaimed ONCA, the dollar test for an audit exemption in the CCA may be seen as being more restrictive, as all three metrics (assets, capital and gross revenue or sales) must be below the maximum threshold, whereas the ONCA requires only one of the measures, the annual revenue of the entity, to be below the stated threshold (e.g., \$100,000 for a public benefit corporation) to be exempt. The CCA is similar to the ONCA from the standpoint of requiring a co-op to appoint an auditor if it receives

government grants or subsidies. The OBCA is more rigorous than the CCA, even though it has no dollar threshold requirements, as it requires that all shareholders must consent in writing to the audit exemption. As well, the CA requires that the entity's annual income be below \$100,000, and also requires all shareholders to consent in writing.

Although an audit provides the highest level of assurance to members or shareholders regarding the financial health of an entity, there are alternative forms of assurance that can be provided that are less costly than a full audit. One such alternative is a review engagement, which is permitted under the not-yet-proclaimed ONCA for business entities that meet specified criteria. A review engagement is conducted to form "a conclusion on the financial statements in terms of whether anything has come to the practitioner's attention to indicate that the financial statements are not prepared in accordance with the [applicable financial reporting framework]".<sup>7</sup>

#### **Questions for consideration:**

- What changes, if any, should be made to the audit requirements in the CCA? For example, are the existing exemption thresholds for members, capital, assets and gross revenue or sales reasonable, or should they be changed? For each recommended change, please provide your rationale.
- Should co-ops be eligible to qualify for exemptions from the audit provisions if they only meet one, or a subset, of the criteria? Which audit exemption criterion is the most difficult to meet for co-ops?
- Should audit requirements in the CCA be aligned with those in either the ONCA or the OBCA?
- Should separate treatment be given to non-share capital co-ops versus share capital co-ops with respect to audit requirements?
- Should co-ops that meet certain criteria be permitted to provide their members with alternative forms of assurance other than a full audit (e.g., a review engagement)? What should those criteria be?
- Is a special resolution (i.e., a resolution confirmed by two-thirds of the members of the co-op) adequate for co-ops that have between 15 and 51 members, when deciding to grant an exemption from the audit requirement? Should all members be required to consent in writing to an audit exemption similar to the OBCA and CA?

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<sup>7</sup> Canadian Standard on Review Engagements (CSRE) 2400, Engagements to Review Historical Financial Statements.

### **III. Raising Capital**

An important element to consider as part of this legislative review is the manner in which co-ops are permitted to raise capital under the CCA via the co-op offering statement regime, compared to the rules in place for other businesses in Ontario. As part of this review, the current regime, including the thresholds for being exempt from the offering statement requirements, and government services in relation to the review of offering statements, are being examined in order to make it easier for co-ops to raise the capital they need to grow their business.

Co-ops are exempt (on a revocable basis) from registration requirements to trade in securities and the requirement to file a prospectus in respect of an offering under the Ontario *Securities Act* (OSA). The 1971 *Report on Co-operatives by the Select Committee on Company Law*<sup>8</sup> (Report) recognized that there were fundamental differences in the securities issued by co-ops as opposed to securities issued by other business corporations, including the fact that shares issued by a co-operative are not listed on a public exchange and are not necessarily purchased for the purposes of obtaining high returns. The Report recommended that a minimum amount of information on offerings be disclosed to investors (not as detailed as a full prospectus under the OSA), and that a standard be set for the purposes of overseeing the issuing of securities by co-ops. This recommendation resulted in the creation of the offering statement regime for co-ops. The OSA, which is administered by the Ontario Securities Commission (OSC) regulates the capital raising activities of all other corporations in Ontario.

#### **Capital Raising Requirements in the CCA**

Currently, a co-op desiring to raise capital from investors is required to file an offering statement with the Superintendent of FSCO before the securities are sold, unless one of the following exemptions applies:

- The co-op has or will have fewer than 35 security holders;
- The securities or debt obligations issued arise from members' patronage returns and are director-mandated;
- Shares or debt obligations are issued to members, if the value of such an issue does not exceed \$1,000 per member in a year and does not exceed an aggregate value of \$10,000 per member;
- Securities issued to members do not result in the co-op having more than \$200,000 of issued and outstanding securities;

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<sup>8</sup> 1971 Report on Co-operatives by Select Committee on Company Law, Ontario.

- Stock dividends are issued under section 59 of the CCA; or
- Securities are issued to prescribed entities such as financial institutions.

The co-op may also elect to exempt itself from the offering statement regime in the CCA by filing both a preliminary prospectus and a prospectus with the OSC and filing the receipts with the Superintendent of FSCO before any securities are sold.

Because a co-op cannot have more than one offering statement open at any given time, one offering must close before another is opened. The co-op's securities are offered for a period of one year or less in an offering statement. Stakeholders have suggested that the review process could be streamlined when a co-op wishes to sell additional securities that were previously part of an expired offering.

## Continuous Disclosure

The CCA outlines requirements for continuous disclosure, including the requirement that, where there is a material change, a co-op may be required to file another offering statement and/or disclose such changes to investors through a material change statement. "Material change" is defined in the CCA as follows:

**"material change" means a change in the business, operations, assets or liabilities of the co-operative that would reasonably be expected to have a significant adverse impact on the financial position of the co-operative or that might prevent the co-operative from achieving the purpose of an offering but does not include a change that is prescribed by the regulations as not a material change.**

In addition, regulations under the CCA list two thresholds for the purposes of defining what is not considered a material change; namely, (i) a change that affects the co-op's gross revenue or gross sales by less than \$20,000; or (ii) a change that affects the co-op's net income or loss by less than \$10,000. These amounts have not been changed since the 1990s. The CCA regulations also provide the details required as part of the disclosure to investors via the offering statement and statement of material change in order for them to meet the standard of full, true and plain disclosure as per the requirements of the CCA.

## Raising Capital under the OSA

The CCA has not kept pace with changes to Ontario's securities laws, which have been updated to provide a number of new exemptions from prospectus requirements that assist capital raising for business enterprises, particularly small and medium-size businesses. The exempt market framework for capital raising in Ontario is regulated under National Instrument 45-106 (Prospectus and Registration Exemptions) and Rule 45-501, which outlines a number of

exemptions, including the offering memorandum exemption and exemptions relating to family, friends and business associates. These exemptions allow companies to cost-effectively raise funds from investors with specific characteristics including securities that are not traded on a secondary market.

Currently a co-op may elect to exempt itself from the offering statement regime in the CCA by filing both a preliminary prospectus and a prospectus with the OSC and filing the receipts with the Superintendent of FSCO before any securities are sold. However, the provisions in the CCA, relating to co-op offerings were drafted prior to some of the aforementioned exemptions being enacted under Ontario's securities laws, and do not contemplate co-ops qualifying for exemptions under the OSA.

## **Other Canadian Jurisdictions**

Ontario, Manitoba, and Saskatchewan have offering statement regimes in place for co-ops. In Manitoba, if the co-op wishes to sell shares to a non-member, it is required to file a prospectus with the Manitoba securities regulator instead of the provincial consumer services ministry. In Alberta and British Columbia, co-ops are subject to those provinces' securities laws when raising capital, and have access to their province's prospectus filing exemptions, which are also regulated by National Instrument 45-106 (with some exceptions for British Columbia).

## **Costs to Co-op Businesses and Government**

It has been reported that co-ops elect to file an offering statement with FSCO instead of a prospectus with the OSC due to the lower cost. However, the costs associated with filing an exempt distribution report under the OSA are not as high as those for filing a prospectus. Currently, the fee to file a Report of Exempt Distribution with the OSC is \$500, and under the OSA's offering memorandum exemption, the fee is the greater of \$500 or 0.025% of gross proceeds of the offering.

The review process undertaken by FSCO can take anywhere from two weeks to 45 days depending on the complexity of the offering, and co-ops cannot begin selling securities until a receipt has been issued for the offering. In contrast, under the exempt market framework, a report of exempt distribution must be filed with the OSC within 10 days of the distribution. It is the filer's responsibility to ensure that all requirements are met, including disclosures to investors where applicable. In addition, depending on the exemption, an offering memorandum must also be filed and provided to all interested investors. It should also be noted that, in both instances, there are costs other than filing fees that are incurred in the share-issuing process, such as legal and accounting fees. These, too, vary depending on the characteristics of the offering. Such costs must also be incurred, of course, by co-ops relying on the CCA's offering statement regime.

In looking to cut red tape for co-ops while also improving cost efficiencies for government, consideration will be given to both the wide variation in the size of offerings and the relatively small number of co-ops that are raising capital under the current offering statement regime.

Under the current co-op offering statement regime, the average securities offering by co-ops was \$11.5 million in the 2016-2017 calendar years. In those same years, the smallest offering was \$198,000 and the largest was \$64.9 million. In the 2014 Annual Report of the Office of the Auditor General of Ontario (OAGO), the OAGO noted that FSCO's "processes for registering and protecting investors of [co-ops] were not commensurate with the risks to investors and the significant amounts involved".<sup>9</sup>

FSCO's costs in undertaking the review of co-op offering statements exceed the offering statement application fee charged to co-ops. FSCO issues receipts for about 25 offering statements per year, and basic information about the offerings are posted on FSCO's website. The fee for reviewing and approving co-op offering statements under the CCA is a flat rate (\$50) and has remained unchanged for many years. In contrast, FSCO's fee structure for credit union offering statements under the *Credit Unions and Caisses Populaires Act, 1994*, varies depending on the amount and complexity of the offering. FSCO currently receives government support for the Co-operatives Sector Support Program, which includes providing services to co-ops and their members, such as reviewing offering statements. There are no government subsidies paid to regulators that oversee other entities raising capital in Ontario.

#### **Questions for consideration:**

- Should there continue to be a separate capital-raising framework for co-ops, or should co-ops be subject to the same Ontario securities laws to which other business corporations in Ontario are subject, including the exempt market framework?
- If the government were to maintain a separate capital-raising framework for co-ops, should the process for reviewing offering statements continue to be subsidized by the government or should the fee be determined on a cost-recovery basis, and based on factors such as the amount, type, or complexity of the offering? If the former, please explain why subsidization should continue.
- If the existing co-op offering statement regime is maintained, would you recommend any changes to the process?
- Are the existing statutory thresholds for exemptions from the offering statement regime under the CCA adequate? If not, what should these thresholds be, and how should they be set?

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<sup>9</sup> 2014 Annual Report, p. 144.

- Should the CCA's private issuer limit of security holders be increased from 35 to 50, to align with the private issuer exemption available to other corporations under the OSA?
- Are there any other aspects of the current offering statement regime that should be considered as part of the review, including, for example, the definition of material change or continuous disclosure requirements, or the type of securities that can be sold?

## 5. Other Issues

The government is interested in understanding how potential proposed amendments to the CCA could impact the various types of co-ops defined in the CCA (e.g., non-profit housing co-ops, worker co-ops, renewable energy co-ops, multi-stakeholder and direct-charge co-ops). In addition, in looking at other provinces, there is an emergence of newer forms of co-ops being regulated in Western Canada, commonly referred to as new-generation co-ops (NGCs). NGCs tend to be agriculture-based, and their business structures tend to support producers by pooling sufficient capital to jointly own and operate processing as well as marketing enterprises.

The government is interested in hearing the views of the members and directors of these types of co-ops in order to inform decisions regarding the overall administration of the CCA and whether there are certain provisions of the CCA that could be clarified to ensure that they apply to various types of co-ops.

### Questions for consideration:

- In determining an appropriate administrative and oversight framework for co-ops, what considerations, if any, need to be given to non-profit housing co-ops, worker co-ops and other specific types of co-ops?
- Are there provisions of the CCA that should be clarified with respect to worker co-ops and non-profit housing co-ops?



# Summary

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The feedback of co-op members, directors and other interested individuals is of utmost importance to the government, as it considers ways to modernize the legislative framework for co-ops. Well-informed feedback will help support a modern legislative framework under which co-ops can compete on a level playing field with other Ontario businesses operating in the same sectors.

Please note any other issues or topics that you would like to see addressed as part of this review. Please provide an explanation for your proposal, with examples if possible. Such issues/topics could include all of the topics noted above, and any other topics including (but are not restricted to):

- Membership (eligibility, meetings, etc.)
- Capital, share types and par value shares
- Enforcement mechanisms, and fines and penalties for offences
- Appeals of decisions of the Minister
- Electronic communications, including member notice requirements

By sharing your comments as part of this consultation, you will help inform future government decision-making regarding the regulation of co-op businesses in Ontario. The government understands that co-ops play an important role for their members and communities, and looks forward to considering ways to ensure that co-ops can continue to serve these needs.